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U.S. Citizenship and Immigration Services

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[redacted]

FILE: LIN 03 274 51150 Office: NEBRASKA SERVICE CENTER Date: JUN 10 2005

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner is a computer consulting firm that seeks to employ the beneficiary as a programmer analyst. As required by statute, the petition was accompanied by certification from the Department of Labor. The director found that the position described in the labor certification does not require a member of the professions holding an advanced degree. The director also found that the petitioner had not established that it had the financial ability to pay the beneficiary's proffered wage as of the filing date of the visa petition.

Section 203(b)(2)(A) of the Act provides that visas shall be made available to qualified immigrants who are members of the professions holding advanced degrees or their equivalent, and whose services in the professions or business are sought by an employer in the United States.

In a proceeding involving an approved labor certification, such as the present proceeding, Citizenship and Immigration Services regulations at 8 C.F.R. § 204.5(k)(4)(i) require that the job offer portion of the labor certification must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability.

8 C.F.R. § 204.5(k)(2) defines "advanced degree" as any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. Therefore, the labor certification must show that the position requires, at a minimum, a degree above that of baccalaureate, or a baccalaureate degree followed by at least five years of progressive experience.

Part A of the Form ETA-750 application for labor certification in the record indicates that the minimum educational requirement for the beneficiary's position is four years of college, culminating in a Bachelor of Engineering degree in Electronics. The minimum experience required is two years in the job offered (i.e., programmer analyst). Thus, according to the labor certification, the position does not require an actual advanced degree, nor does it require at least five years of progressive post-baccalaureate experience.

We note that, in preparing the labor certification form, the petitioner originally indicated that the position required six years and six months of experience in the job offered. These figures have been obscured with correction fluid, and replaced with the indication that the position requires two years of experience in the job offered. The form does not indicate that the position requires any experience in a related occupation.

The director denied the petition because the labor certification does not show that the position requires, at a minimum, an advanced degree or five years of progressive post-baccalaureate experience. On appeal [redacted] the petitioner's human resources manager, states: "in our industry it is widely acknowledged that the highly specialized position of 'Programmer Analyst' would have several years of Programming experience. Therefore, an individual with 2 years of Programmer Analyst experience would qualify as an individual with an advanced degree."

[redacted] observes that the petitioner had initially specified that the position requires six years and six months of experience, but the Department of Labor returned the Form ETA-750 with the following comments:

> ETA 750 A lists 6 years six months experience requirement with a Bachelor's Degree. This exceeds the SVP Code 7 timelines of 2 to 4 years experience for a Programmer Analyst, DOT 030.162.014. . . . Also, the advertisements require three years experience bringing about a discrepancy between the ETA 750 A and the advertisements. With a Bachelor's degree, the experience requirement should not exceed 2 years and the job would have to be re-advertised in a Sunday Newspaper.

As noted above, the petitioner made the required change to the Form ETA 750. [redacted] states: "We complied with [the Department of Labor's] instructions because we know that in order to be classified as a 'Programmer Analyst' it is generally understood in the industry that such an individual would have several years of general business experience." [redacted] observes that the Department of Labor's *Occupational Outlook Handbook*, 2004-2005 edition, states: "With general business experience, programmers may become programmer-analysts." Thus [redacted] argues, experience as a programmer analyst implies *additional* experience in a lower position such as that of a programmer. The implication is that all of this experience, taken together, amounts to at least five years of progressive post-baccalaureate experience.

There are several problems with the petitioner's logic. First of all, the *Occupational Outlook Handbook* does not specify how much "general business experience" is necessary to qualify as a programmer-analyst. Thus, this document does not support the petitioner's claim that "several years" of such experience are necessary. Also, the petitioner has gone on record to acknowledge that the Department of Labor (which publishes the *Occupational Outlook Handbook*) found the originally stated experience requirement to be "excessive." Because, by regulation, eligibility hinges on the job offer *as described on the labor certification*, the petitioner is not at liberty to claim that there are additional, unwritten requirements beyond those that appear on the labor certification. The Form ETA 750A allows an employer to specify the minimum required experience not only in the job offered, but also in a related occupation. Thus, the petitioner could have specified a certain amount of experience as, say, a programmer, in addition to the experience required in the position of a programmer analyst. We do not accept the claim that such information was unnecessary because "the industry" tacitly assumes such a requirement.

Finally, the record shows that the beneficiary received his bachelor's degree on March 31, 1996. On the statement of qualifications, Form ETA 750B, the beneficiary claims that his first job as a programmer analyst (at Park Controls & Communication) began only 15 months later, in July 1997. Three letters from that company all indicate that he began working on September 1, 1997, with the titles "senior software engineer" and "project manager." Leaving aside the discrepancy in the dates, if we accept that a "senior software engineer" is the same thing as a "programmer analyst," then the record shows that the beneficiary earned that title less than a year and a half after he received his bachelor's degree. Mathematically, it follows that the beneficiary had the required two years of experience as a programmer analyst after only three and a half years of post-baccalaureate experience. If the beneficiary was, as claimed, a programmer analyst as early as September 1997, then it inescapably follows that two years of experience as a programmer analyst does *not* correlate to a minimum of five years of post-baccalaureate experience.[1]

For the above reasons, we affirm the director's finding that the position, as described on the labor certification, does not require an advanced degree or its equivalent in post-baccalaureate experience.

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[1] If the beneficiary was *not* a programmer analyst in 1997, then his Form ETA 750B, signed under penalty of perjury, contains a materially false assertion. In such a case, the petition could not be approved because section 204(g) of the Act does not permit approval of employment-based petitions that contain untrue information.

The other basis for denial relates to the petitioner's ability to pay the beneficiary's proffered wage. 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

In order to establish eligibility in this matter, the petitioner must demonstrate its ability to pay the wage offered as of the petition's filing date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's filing date is April 15, 2003. The beneficiary's salary as stated on the labor certification is $70,000 per year. With the original petition, the petitioner submits copies of its tax returns for 2000, 2001 and 2002. The beneficiary did not begin working for the petitioner until January 2003, and therefore the petitioner's expenses in previous years would not have included the beneficiary's salary.

The petitioner's 2000 tax return shows a net loss of $127,399 and no cash assets. The 2001 return reflects a net loss of $21,773 and $44,797 in cash assets. The 2002 return, marked "DRAFT," shows net income of $4,570 and -$16,845 in cash assets. Also in 2002, the petitioner's current liabilities exceeded its current assets by well over $100,000. In denying the petition, the director noted these figures and observed that, while there has been a trend toward improvement in the petitioner's financial situation, the initial submission does not establish that the petitioner has been able to pay the proffered wage.

On appeal, the petitioner submits a copy of the beneficiary's 2003 Form W-2 Wage and Tax Statement, indicating that the petitioner paid the beneficiary $83,229.80 that year. The petitioner notes a memorandum from [redacted]Associate Director of Operations, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)* (May 4, 2004), which calls for a favorable finding if the petitioner demonstrates that it is paying the beneficiary the proffered wage. The petitioner also submits a draft copy of its 2003 income tax return, indicating taxable income of $39,885 and payment of $2,168,076 in wages.

The newly submitted evidence shows that the petitioner's financial situation continues to improve, and that the petitioner paid the beneficiary in excess of the proffered wage in 2003, the year the petitioner applied for labor certification. Because the director issued no request for evidence before denying the petition, the petitioner had no prior opportunity to submit these materials. Faced with this evidence that the petitioner has in fact paid the beneficiary in excess of the proffered wage, it is difficult for us to conclude that the petitioner was unable to pay that wage. We find, therefore, that the petitioner has overcome this ground for denial. The other basis for denial, however, still stands, and therefore we affirm the denial of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the decision of the director will not be disturbed and the appeal will be dismissed.

ORDER: The appeal is dismissed.